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No. 86-1141 (2)

IN THE

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1986

GEORGE VAKALIS - PETITIONER
vs.
EUGENE M. KAGAN, JACK HEFLIN, ALLEN M. HEFLIN, COUNTRY CLUB ASSOCIATES, EAST STREET MALL ASSOCIATES, E. REUEL STOLTZ, CPA, SPITZ, SULLIVAN, WACHTEL & FALCETTA, INTERSTATE REGIONAL SHOPPING CENTERS, LTD., BERTRAM ROBINSON, HARLAND SHAPIRO, VSR ASSOCIATES, ELAINE G. KAGAN -RESPONDENTS

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOINT BRIEF OF RESPONDENTS
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

On August 11, 1980, respondents Jack Heflin and Eugene M. Kagan exercised their contractual right to purchase the partnership interest of the petitioner George Vakalis in a real estate development partnership known as Country Club Associates. That action was the culmination of years of disputes among the participants, who were involved in a number of different real estate ventures.

Two weeks after the buy-out, petitioner filed a complaint in the superior court of the Commonwealth of Massachusetts, Hampden County, against respondents Eugene M. Kagan, Jack Heflin, Allen M. Heflin, and Bertram Robinson, involving one of those ventures. *Vakalis v. Kagan, et al.*, No. 80-1280, filed August 23, 1980. Later that same year, petitioner filed another lawsuit in the superior court of the Commonwealth of Massachusetts, this time in Worcester County, also complaining of his treatment by respondents Eugene M. Kagan, Jack Heflin, and Allen M. Heflin. *Vakalis v. Eugene M. Kagan, Jack F. Heflin and Allen M. Heflin,* No. 80-18814, filed December 10, 1980. Petitioner obtained a jury verdict in his favor, and an award of damages, in a consolidated trial of these two cases on January 31, 1983. See the opinion of the District Court, Pet. App. 9a-10a.[1]

Not content with his recovery in the Massachusetts courts, on July 17, 1985, petitioner filed a 97-page Complaint in the United States District Court for the District of

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[1] References to the opinions below will be cited to the Appendix to the Petition for Certiorari as Pet. App. The District Court opinion may be abbreviated as Dist. Ct. Op. The opinion of the Court of Appeals may be abbreviated as Ct. App. Op. References to the Complaint in this case will be cited to the appendix filed by respondents as App. _____.

Connecticut.[2] Petitioner's Complaint alleges eleven counts of violations of the Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. § 1961 et seq. The Complaint seeks "treble the damages sustained by [the petitioner] in the amount of $15,000,000 plus an amount yet unknown to [the petitioner] in addition to other consequential, Hedonic and physical stress damages and incidental damages plus $35,000,000 punitive damages plus costs and all attorney's fees." Complaint at 96-97, App. 222a-23a. In essense, petitioner's Complaint alleges that the defendants in the Massachusetts actions, with the assistance of other respondents not named in the Massachusetts actions, have fraudulently deprived him of his asserted interests in various real estate ventures.

Although petitioner filed his complaint *pro se,* he informed the Court below that the Complaint had been prepared and reviewed by counsel, a "federal prosecutor", Tr. of Proceedings, Sept. 9, 1985, at 10, *Vakalis v. Kagan,* No. H-85-614, (D. Conn.), and the Complaint's excruciating detail gives credence to his claim. The Complaint contains eleven pages of specifications of "predicate acts" intended to establish the "pattern" of racketeering activity required by RICO, 18 U.S.C. § 1961(5). See Complaint, Count 1, paragraphs 106a-106c, App. 91a-110a.

With a few exceptions carefully noted and appropriately dismissed as insignificant by the District Court, Dist.

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[2] On June 4, 1986, petitioner filed two additional cases in the Superior Court of Connecticut, Judicial District of Hartford at Hartford. *George Vakalis v. Eugene M. Kagan, Jack Heflin and Mark Robinson,* No. CV-86-0319390-S; *George Vakalis v. Eugene M. Kagan, Jack Heflin and Allen M. Heflin,* No. CV-86-0319389-S. Petitioner also filed two suits against financial institutions involved in the same series of real estate transactions. *Vakalis v. State Mutual Life Assurance Co.,* Docket No. 83-0539-F (D. Mass. 1985), *aff'd mem.,* 787 F.2d 579 (1st Cir. 1986); *Vakalis v. Shawmut Bank,* Docket No. 85-02125 (D. Mass. 1985) (dismissed).

Ct. Op., Pet. App. 11a n.1, all of the predicate acts carefully enumerated by petitioner were dated more than three years prior to the filing of his Complaint. Indeed, the vast majority of the acts alleged are claimed to have occurred in 1979 and 1980 during the controversy leading to petitioner's ouster from Country Club Associates. Moreover, although petitioner argues in this Court that he "did not learn of the magnitude of the pattern of multiple criminal schemes until much later," Pet. 6; see *id.* at 10-12, his Complaint alleges otherwise. Thus, petitioner alleges that the scheme against him was "cover[ed] up by tricks and schemes and devices . . . until sometime in 1979 . . ." Complaint, count 9, paragraph 3, App. 146a. Even more explicitly, petitioner alleges later in his Complaint that "[t]he plaintiff discovered further the existence and extent of the major scope of the frauduient scheme during late 1979 and 1980." Complaint, Count 11, paragraph 14, App. 218a.

Most of the respondents moved to dismiss the Complaint for failure to state a claim upon which relief can be granted. Among the grounds raised in these motions were the expiration of the statute of limitations and res judicata. The respondents who did not file motions to dismiss raised the statute of limitations as an affirmative defense in their answers. *See* Dist. Ct. Op., Pet. App. 7a-9a. Relying on the dates of the alleged predicate acts set forth by petitioner in his Complaint, the District Court held that the RICO action was barred by the three-year statute of limitations contained in Conn. Gen. Stat. § 52-577.[3] The District Court applied § 52-577 to plaintiff's Complaint because it concluded that the gravamen of the Complaint sounded in fraud, and § 52-577 is the Connecticut statute of limitations applicable to common law fraud actions. The Court also concluded

[3] Section 52-577 reads: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

that the statute began running at the later of the last predicate act alleged in the Complaint or the date the conspiracy became known. Dist. Ct Op., Pet. App. 8a-9a. Applying that standard, the Court concluded that "it appears from the face of the Complaint that the action is time barred." *Id.*, Pet. App. 9a.

On appeal, the United States Court of Appeals for the Second Circuit summarily affirmed in an unpublished opinion. Pet. App. 1a-3a. The Court of Appeals rejected petitioner's contention that the District Court should have applied the six-year statute of limitations provided by Conn. Gen. Stat. § 52-576 for a partnership accounting. Rather, the Court of Appeals agreed with the District Court that petitioner's action sounded in fraud and that the three-year statute of limitations applied. The Court of Appeals held that the limitations period began to run when petitioner had actual knowledge of the alleged fraud. Pet. App. 2a-3a. Petitioner's allegation that he "discovered further the existence and extent of the major scope of the fraudulent scheme during late 1979 and 1980," Complaint, Count 11, paragraph 14, App. 218a, established beyond dispute the date on which the statute of limitations began running.[4]

SUMMARY OF ARGUMENT

The petition for certiorari presents no questions which deserve the attention of this Court. Petitioner advocates a unique theory of the appropriate statute of limitations for RICO which has no support in the legislative history and has never been adopted by any court. Petitioner accepts the

[4] The District Court had also concluded that petitioner's claims as to respondents Allen M. Heflin, Jack Heflin, and Eugene M. Kagan were barred by the doctrine of res judicata. Dist. Ct Op., Pet. App. 9a-10a. The Court of Appeals did not consider that aspect of the District Court's holding. Similarly, the District Court did not reach all of the grounds for dismissal asserted by the various respondents, such as respondent East Street Mall's contention that the claims against it were barred by the doctrine of res judicata and that petitioner's complaint does not set forth any cause of action as to East Street Mall.

legal theories used by the courts below but asks this Court to review the application of those theories to the particular facts of his case. There is no reason for this Court to do so.

Petitioner has not presented to this Court and did not raise in the courts below the issues presented for review in *Agency Holding Corp., et al., v. Malley-Duff & Associates, Inc.*, No. 86-497, and *Crown Life Insurance Co., et al., v. Malley-Duff & Associates, Inc.*, No. 86-531. Moreover, whichever side prevails in *Malley-Duff*, the result below would not change. Accordingly, this Court should deny the petition for certiorari without waiting for the *Malley-Duff* case to be decided.

ARGUMENT

I. NONE OF THE QUESTIONS PRESENTED BY THE PETITION FOR CERTIORARI WARRANTS THE ATTENTION OF THIS COURT

Petitioner presents three questions for review by this Court. Pet. i. Petitioner's first question asks this Court to adopt a statute of limitations theory for RICO that has not been adopted, or even considered seriously, by any court and for which petitioner presents no hint of support in the legislative history of the statute. His second question asks this Court to review a question of state law, whether the District Court and the Court of Appeals properly applied the Connecticut statute of limitations. The final question presented by the petitioner also asks this Court to determine a question of state law, whether the District Court and the Court of Appeals identified the proper Connecticut statute of limitations in the particular context of this petitioner's claims for relief. None of these questions deserves the attention of this Court.

A. This Court Should Not Review the Unique and Totally Unsupported Theory of a Ten-Year Statute of Limitations in RICO Actions Presented by Petitioner's First Question.

Although his argument is less than pellucid, the theory in the first segment of petitioner's request for review appears to be that the applicable state statute of limitations does not even begin to run against a RICO claimant until ten years have passed from the date of the first predicate act. Petitioner bases this imaginative claim on the fact that Congress defined a "pattern of racketeering activity" to require the commission of at least two "acts of racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5).

The legislative history contains no suggestion that Congress intended the ten-year period within which the statutory definition of a pattern of racketeering activity could be satisfied to be a "window", Pet. 12, during which the statute of limitations would be tolled. No lower court in the federal system ever has so held. Indeed, respondents have found no case in which a court has even suggested the possibility that the ten-year period contained in the definition of a "pattern of racketeering activity" might serve as a period during which the statute of limitations was tolled.

Petitioner's argument rests on a fundamental misunderstanding of what the courts below held. Petitioner contends that the holdings below allow the sanctions of RICO to be avoided by the simple expedient of spacing predicate acts more than three years apart. Pet. 11. That argument makes no sense.

Neither the discovery theory relied on by both courts below nor the alternative last predicate act theory relied on by the district court conflicts with the congressional determination that a pattern of racketeering activity may develop over a ten-year period. The last predicate act analysis looks forward from the time of the last act in the alleged pattern; it places no limit on how far back the plaintiff may go in order to establish a pattern of racketeering activity. Similarly, a requirement that a plaintiff bring a RICO action sounding in fraud within the appropriate statutory period after he has

actual knowledge of the alleged fraud against him places no improper bounds on the scope of relief obtainable under RICO. That rule allowed petitioner to make full use of the ten-year period defined by Congress to prove the existence of a "pattern of racketeering activity"; it simply required him to act within the specified time once he knew facts on which he could rely to establish that pattern.

Thus, the absence of legislative history or precedent to support petitioner's argument is matched by that argument's lack of internal logic. This Court sits to resolve significant legal questions as to which the lower courts are in disagreement or to correct a lower court which has "so far departed from the accepted and usual course of judicial proceedings" that exercise of this Court's supervisory power is warranted. Sup. Ct. R. 17.1(a), (c). The first question presented in the Petition for Certiorari does not identify any important question of federal law or deviation from accepted practice which would warrant review by this Court.

B. The Issue Whether the Courts Below Properly Applied Connecticut State Law Doctrines to the Particular Facts of Petitioner's Case, Presented by Petitioner's Second and Third Questions, Does Not Warrant Review.

Petitioner's second and third questions presented ask this Court to determine whether the courts below properly applied Connecticut state law to the facts of petitioner's claim. In his second question, petitioner contends that the courts below "erred in applying only a portion of the law regarding the Connecticut statute of limitations" to his case and misconstrued "settled Connecticut law". Pet. i, 13-15. In his third question, petitioner claims only that the courts below chose the wrong Connecticut statute of limitations to apply to the facts of his case. Petitioner does not contend that the courts below erred by holding that the statute of limitations would begin to run on the date of the last predi-

cate act, *see* Pet. 14, nor does petitioner challenge the doctrine that a RICO action is governed by the state statute of limitations applicable to the state law action most closely analogous to the claims made in the RICO complaint. Rather, petitioner asks this Court to exercise its authority to determine whether the lower courts correctly applied settled legal doctrine to the facts of his case.

Petitioner's attacks on the substance of the rulings below are totally without merit.[5] More importantly for present purposes, petitioner presents no justification for his request that this Court review the errors he claims to have occurred. This Court does not sit to correct the lower federal courts' understanding or application of state law, *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944), or merely to resolve claims by individual litigants that the lower courts have incorrectly ruled against them. *Ross v. Moffitt,* 417 U.S. 600, 616-617 (1974). Petitioner offers no other justification for his request that this Court grant certiorari to review his case.

Petitioner's contention that the Connecticut statute of limitations for actions for an account or on a contract,

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[5] Petitioner's contention that the lower courts misapplied the Connecticut statute of limitations is wrong in two respects. First, petitioner attempts to rely on the Connecticut doctrine of fraudulent concealment as justification for his claim. Pet. at 14. That reliance is belied by petitioner's allegations that he had discovered the alleged conspiracy by 1979 or 1980. See p. 3, 4 *supra.* Petitioner's claim that the courts below should have applied the Connecticut doctrine applicable to continuing wrongs is defeated by his own recognition that " 'the statute of limitations for violations of the act [RICO] runs from the date of the last alleged act of racketeering activity.' " Pet. 14, quoting *United States v. Field,* 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd,* 578 F.2d. 1371 (2d Cir. 1978), *cert. dismissed,* 439 U.S. 801 (1979). Petitioner simply refuses to recognize that the District Court carefully reviewed his extensive allegations and properly concluded that he did not plead any predicate acts within three years of the date of his Complaint.

Conn. Gen. Stat. § 52-576(a), should have been chosen by the courts below as the applicable statute of limitations simply ignores the essence of his own Complaint. As petitioner states on virtually every one of the 97 pages of his Complaint, his claim is that he was the victim of a massive fraud. The lower courts correctly chose to apply the statute of limitations applicable to civil fraud.

II. THE RESULT BELOW WILL NOT BE AFFECTED BY THIS COURT'S DECISION IN *AGENCY HOLDING CORP., ET AL., V. MALLEY-DUFF & ASSOCIATES, INC.*

On December 1, 1986, this Court granted certiorari in the cases of *Agency Holding Corp., et al., v. Malley-Duff & Associates, Inc.*, No. 86-497, and *Crown Life Insurance Co., et al., v. Malley-Duff & Associates, Inc.*, No. 86-531, to review the opinion of the Court of Appeals for the Third Circuit in *Malley-Duff & Associates v. Crown Life Insurance Co.*, 792 F.2d 341 (1986). The questions on which this Court has granted review in *Malley-Duff* concern the procedure by which federal courts should choose limitations periods for civil RICO claims and the manner in which the starting period for determining whether a statute of limitations has run is to be determined in a civil RICO claim.

Although there is a surface similarity between the questions on which this Court has granted review in *Malley-Duff* and the questions presented by petitioner, the issues to be reviewed in *Malley-Duff* are not the issues raised by petitioner in the courts below or in this Court. Moreover, the outcome of this case would be the same whether the governing rule of law is the rule favored by the petitioners or the rule favored by the respondents in *Malley-Duff*. Accordingly, there is no reason for this Court either to grant a writ of certiorari in this case or to delay its decision on the petition for certiorari until it has decided the *Malley-Duff* case.

The first issue presented by the *Malley-Duff* case is whether the state statute of limitations applicable to a civil RICO action is to be determined by selecting a single state statute to govern all civil RICO actions in that state, as the Third Circuit held, or by selecting the state statute applicable to the state cause of action most closely analogous to the particular RICO complaint. Both the Sixth Circuit, *Silverberg v. Thomson McKinnen Securities, Inc.*, 787 F.2d 1079 (1986), and the Second Circuit in its opinion below, Ct. App. Op., Pet. App. 2a, have adopted the latter rule. The respondents in *Malley-Duff* support the position taken by Judge Sloviter, concurring in the judgment of the Third Circuit, that the four-year statute of limitations contained in the Clayton Act, 15 U.S.C. § 15b, should be applied to all RICO claims.

In his argument to the Court of Appeals and in his plea to this Court, petitioner has not challenged the rule of law followed by the courts below. Rather, petitioner has simply argued that those courts should have chosen another Connecticut statute because the facts of his Complaint make that statute more appropriate than the statute chosen by the courts below. Petitioner made no claim in the courts below and makes no claim in this Court that the lower courts should have chosen a single Connecticut statute or a single federal statute to govern all RICO actions in Connecticut, nor does he contend that the statute he favors for his case should be applied to all RICO actions.

Thus, petitioner has not raised in any court the issue to be considered by this Court in *Malley-Duff*. Since petitioner has not raised that issue in his petition or in the courts below, disposition of his case should not be affected by this Court's decision in *Malley-Duff*. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Irvine v. California*, 347 U.S. 128, 129 (1954).

In any event, if this Court determines that the rule adopted by the Court of Appeals for the Third Circuit states the correct procedure for identifying statutes of limitations for civil RICO actions, the result in this case will be the same. The statute of limitations applied by the courts below is the Connecticut statute applicable to all actions "founded upon a tort". The only other remotely possible candidate to be the generally applicable RICO statute of limitations in Connecticut would be Conn. Gen. Stat. § 52-584, the statute applicable to actions "for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . "[6] The limitations period in that statute is either "two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered," or "three years from the date of the act or omission complained of," whichever is shorter. Thus, the limitations period under § 52-584 is the same as or shorter than the limitations period under § 52-577. Whichever statute is applied, petitioner's action is barred.[7]

Petitioner is similarly unable to take advantage of the second issue to be considered by this Court in *Malley-Duff*. That question is whether the statute of limitations in a RICO action begins to run for each alleged injury as of the date of the predicate act that causes that injury or begins to run only as of the date of the last predicate act. Again, petitioner has not challenged the rule of law adopted below, which triggers the statute of limitations as of the date of the

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[6] There is no equivalent in Connecticut to the Pennsylvania "catchall" statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981), applicable to statutory actions in general, which was applied by the Third Circuit in *Malley-Duff*. *See* Conn. Gen. Stat. Ch. 926.

[7] If this Court chooses to apply the four-year limitations period of the Clayton Act, the result below will remain the same because all of the predicate acts alleged in the Complaint occurred more than four years before the Complaint. *See* Dist. Ct. Op., Pet. App. 8a-9a, 11a n.1; Complaint, count 1, paragraphs 106a-106c, App. 91a-110a.

last predicate act. *See* Pet. 14. Rather, he has merely challenged the application of that rule.

Moreover, adoption by this Court in *Malley-Duff* of the suggested alternative to the rule used by the courts below would not benefit petitioner. Petitioner has set forth in exceedingly fine detail the predicate acts on which he relies and the injury he claims. His detailed Complaint establishes that the statute of limitations had expired before he sued whether that statute runs from the date of each predicate act or solely from the date of the last predicate act.

Since petitioner has not presented the contentions that this Court will resolve in *Malley-Duff* and since the issues raised in *Malley-Duff* do not lead to a different result in this case whether the opinion in *Malley-Duff* is affirmed or reversed, this petition should be dealt with and denied without regard to the pending *Malley-Duff* case.

CONCLUSION

The Petition for Certiorari in this case presents no significant legal questions and does not warrant review by this Court. Whatever the outcome in the *Malley-Duff* case now pending before this Court, the result below is correct and should be allowed to stand. Respondents therefore respectfully request that the Petition for Certiorari be denied.

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